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**Firstline Transportation Security, Inc. and International Union, Security, Police and Fire Professionals of America (SPFPA).** Case 17–RC–12354

June 30, 2005

**ORDER GRANTING REVIEW**

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER  
AND LIEBMAN

Employer's Request for Review of the Regional Director's Decision and Direction of Election is granted as it raises substantial issues warranting review.

These substantial issues are of first impression and include whether the Board has statutory jurisdiction over privately employed airport security screeners and, if so, whether the Board should exercise that jurisdiction.

Our colleague would deny review. Thus, the fundamental difference between our position and that of our colleague is that we think that the issues presented are worthy of review, and she would foreclose that review. Given the significance of the issues, and the interests of other Federal agencies however, we think it important that the Board hear from those agencies, interested amici, and further from the parties. Accordingly, we grant review.<sup>1</sup>

Dated, Washington, D.C. June 30, 2005

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

Citing the debate over the Aviation and Transportation Security Act (ATSA)<sup>1</sup>, the statute implicated here, one commentator has observed:

For decades, the statutory pronouncements of Congress and most state legislatures have favored collective bargaining in private and public employment. Now this principle is under attack.

Joseph Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn from History and Experience*, 6 U. Pa. J. Lab. & Emp. L. 295,

<sup>1</sup> We decline in this order to engage in substantive debate with our colleague about the merits of the issues. To do so would suggest that we have resolved them. Nothing could be further from the truth.

<sup>1</sup> 49 U.S.C. §114

297 (2004). Given the current climate of skepticism, even hostility, toward collective bargaining, the Board's decision to grant review in this case is deeply troubling, not least because it comes from the agency charged with *protecting* the institution of collective bargaining in the private sector. I see no basis for questioning the labor-law rights of airport screeners employed by private companies, not the Federal government. And absent "compelling reasons," the Board should not grant review.<sup>2</sup> Board's Rules and Regulations, Section 102.67(c).

Whatever limits Congress may have placed on collective-bargaining by Federal employees of the Transportation Security Administration (TSA),<sup>3</sup> nothing in the ATSA suggests that Congress intended to deprive private-sector screeners of the protection of the National Labor Relations Act, with the apparent exception of the right to strike.<sup>4</sup> The ATSA provision on which the Employer relies gives the Under Secretary of Transportation for Security discretion to fix employment terms and conditions solely for individuals employed in the "Federal service."<sup>5</sup> It makes no reference to employees of private screening companies. Nor did the January 8, 2003 determination of TSA's Under Secretary to deny Federal screeners the right to engage in collective-bargaining or be represented by a union. Indeed, TSA has stated publicly that it takes no position with respect to collective bargaining by screeners employed by private companies, which the agency describes as a "matter between those screeners and their private employer."<sup>6</sup> It would be questionable if one federal agency sought to override the authority of another, without a clear expression of Congressional intent.<sup>7</sup>

Nor, contrary to the Employer's invitation, should the Board itself create an unprecedented "national security" exception to its jurisdiction, assuming it has the power to

<sup>2</sup> But see *Dana Corp.*, 341 NLRB No. 150, slip op. at 2 (2004).

<sup>3</sup> See *Transportation Security Administration & American Federation of Government Employees*, 59 FLRA 423 (2003).

<sup>4</sup> See 49 U.S.C. §44935(i) ("An individual that screens passengers or property, or both, at an airport under this section may not participate in a strike, or assert the right to strike, against the person (including a governmental entity) employing such individual to perform such screening.").

Of course, collective bargaining is not dependent on the right to strike. Employees of the United States Postal Service, for example, are covered by the NLRA, despite a prohibition against striking. 39 U.S.C. §§410(b), 1209 (Postal Service Reorganization Act). Public safety workers across the country, in turn, bargaining collectively under various state laws despite the same prohibition. See Slater, *supra*, 6 U. Pa. J. Lab. & Emp. L. at 334-338 (describing collective bargaining by police and firefighters, "among the most highly unionized professions").

<sup>5</sup> 49 U.S.C. §44935, Note.

<sup>6</sup> See, e.g., *Screening Partnership Program, Frequently Asked Questions* available at TSA's website:

[http://www.tsa.gov/public/interapp/editorial/editorial\\_1752.xml](http://www.tsa.gov/public/interapp/editorial/editorial_1752.xml) (last visited June 30, 2005)

<sup>7</sup> The Supreme Court has repeatedly held that "absent 'a clearly expressed congressional intention,' . . . repeals by implication are not favored." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (citations omitted).

do so. The Board's historical approach has been precisely the opposite, asserting jurisdiction *because*, for example, an employer's operations have a substantial impact on national defense. See *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB 318, 320 (1958).<sup>8</sup> As the Board has explained, applying the Act and its remedies to such operations "reduce[s] the number of labor disputes which might have an adverse effect on the Nation's defense effort." *Id.*

Similarly, the Board has rejected arguments that it should not assert jurisdiction over workers employed at nuclear energy plants, operated under contract with the federal government, on national security-related grounds. See, e.g., *General Electric Co.*, 89 NLRB 726, 736 (1950). And during the Second World War, the Board exercised jurisdiction over militarized plant guards, with the Supreme Court's approval.<sup>9</sup> See *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398 (1947); *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947). The *Jones & Laughlin* Court observed that "in this nation, the statutory rights of citizens are not to be readily cut down on pleas of military necessity . . ." 331 U.S. at 426. In *E.C. Atkins*, the Court agreed with the Board that there was no conflict between the unionization of plant guards on one hand and their loyalty and efficiency on the other. 331 U.S. at 404-405.<sup>10</sup>

To conclude that private security screeners have no rights under the NLRA would consign them to an employment no-man's land, where neither federal-sector nor private-sector protections apply. It arguably would violate the international obligations of the United States to

protect workplace freedom of association.<sup>11</sup> And given the difficult working conditions for screeners in high-stress jobs, it certainly would not promote harmonious labor relations and the ultimate goal of improved airport security. If the Board would not reach such a harmful result—and I hope it will not<sup>12</sup>—then there is no reason to take up the issues presented in the Employer's request for review. Instead, consistent with the Board's responsibility to administer the NLRA, we should exercise jurisdiction here and let Congress or the courts tell us if we are wrong.

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Wilma B. Liebman,

Member

NATIONAL LABOR RELATIONS BOARD

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<sup>11</sup> The issue has been raised with respect to recent denials of collective-bargaining rights to federal employees by a complaint now pending before the Committee on Freedom of Association of the International Labor Organization, a United Nations agency (Case No. 2292, presented by the American Federation of Government Employees).

<sup>12</sup> But cf. *IBM Corp.*, 341 NLRB No. 148, slip op. at 4 (2004) (majority opinion citing "events of September 11, 2001 and their aftermath" as one basis for overruling precedent that nonunion employees are entitled to coworker representation in disciplinary interviews).

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<sup>8</sup> See also 2 American Bar Association, Section of Labor & Employment Law, *The Developing Labor Law* 2157 & n. 464 (4th ed. 2001) (Patrick Hardin & John E. Higgins, Jr., eds.) (collecting cases).

<sup>9</sup> The Board already has determined that the workers involved in this case are guards. See *Firstline Transportation Security, Inc.*, 17-RC-12297, -12298. That determination limits their rights under the Act, relative to other employees: Sec. 9(b)(3) of the Act requires separate bargaining units for guards and prohibits the Board from certifying a union to represent guards if it admits non-guards to membership.

<sup>10</sup> The Court observed that the function of guards was "not necessarily inconsistent with organizing and bargaining with the employer" and that "unionism and collective bargaining are capable of adjustments to accommodate the special functions of plant guards." 331 U.S. at 404-405. The Court rejected the assumption that unions would "make demands upon plant guard members or extract concessions from employers so as to decrease the loyalty and efficiency of the guards." *Id.* at 405.